



Comptroller General
of the United States

Washington, D.C. 20548

144718

Decision

Matter of: ILC Dover, Inc.

File: B-244389

Date: August 22, 1991

Ronald S. Perlman, Esq., Porter, Wright, Morris & Arthur, for the protester.

J. Eric Andre', Esq., Crowell & Moring, for Mine Safety Appliances Company, an interested party.

Jeffrey I. Kessler, Esq., and Major Norman N. Weeden, Esq., Department of the Army, for the agency.

Katherine I. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's letter to agency expressing an interest concerning a solicitation and received by the agency before the closing date, does not constitute a protest to the agency, because it does not rise above an expression of a hope or expectation regarding the procurement.

DECISION

ILC Dover, Inc. protests the issuance by the United States Army Armament, Munitions and Chemical Command of solicitation No. DAAA09-91-R-0720, on a sole-source basis to Mine Safety Appliances (MSA). The solicitation is for 9,786 M43A1 chemical biological protective (gas) masks, various spare parts, and an additional set of tooling for production of the masks. Dover challenges the agency's decision to issue the solicitation on a sole-source basis.

We dismiss the protest as untimely filed.

On March 11, 1991, Dover wrote to the agency indicating that it had heard that the Army was "considering" a sole-source purchase of masks from MSA and expressing the view that since the Gulf War had ended that the purchase should be made competitively. Subsequently, on May 28, Dover was informed by an agency official that a sole-source solicitation for the masks had been issued to MSA. On June 5, Dover was provided with a copy of the solicitation, which contained a proposal due date of June 6. Dover filed its protest of the sole-source with our Office on June 7.

MSA argues that Dover's March 11 letter to the agency did not constitute an agency-level protest and, therefore its protest of the nature of the solicitation filed after the closing date is untimely under our Bid Protest Regulations, 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. Part 21). For the reasons set forth below, we agree.

Our Regulations require that protests of apparent solicitation improprieties--such as its limitation to a sole-source--be filed with our Office or the procuring agency prior to the closing date for the receipt of proposals, 56 Fed. Reg. 3,759 supra (to be codified at 4 C.F.R. § 21.2(a)(1)). In a case where an alleged impropriety is timely protested to a contracting agency, any subsequent protest to this Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the protest. 56 Fed. Reg. 3,759 supra (to be codified at 4 C.F.R. § 21.2(a)(3)). Under these rules, if we consider Dover's March 11 letter to constitute an agency-level protest, its subsequent protest to our Office would be timely. However, we agree with MSA that the letter does not constitute a protest.

To be regarded as a protest, a written statement need not state explicitly that it is in fact a protest but must convey the intent to protest by an expression of dissatisfaction and a request for corrective action. Constantine N. Polites & Co.--Recon., B-233935.2, Feb. 17, 1989, 89-1 CPD ¶ 173. The written statement must contain more than simply a suggestion regarding the procurement. Id.

The March 11 letter from Dover states in pertinent part:

"Now that the Gulf War is over, we expect the Army will return to its original plan for purchase of the improved M43E1 in a full and open competition. . . . We look forward to receipt of the solicitation and anticipate a responsive and competitive reply."

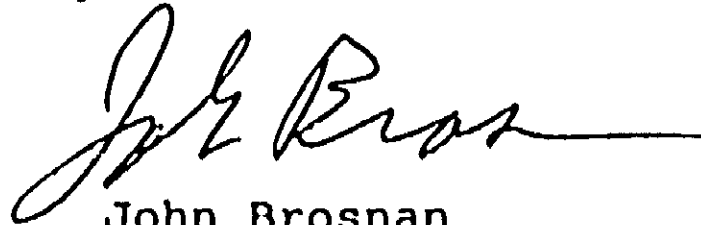
The letter does express Dover's view that the requirement ought to be competed but it does not in our view rise above the expression of a hope or expectation on the part of Dover concerning an M43E1 mask procurement.^{1/} This does not constitute a formal protest.

^{1/} The relationship between the M43E1 mask, which is the subject of Dover's March 11 letter, and the M43A1 mask, at issue in this protest, has not been explained by the protester.

Consequently, there was no formal protest filed by Dover with the agency prior to the solicitation's June 6 closing date. Thus, the June 7 protest to our Office was untimely.

Finally, Dover argues that even if its protest to our Office is untimely, the issue presented regarding the sole source to MSA should be considered under the significant issue exception to our timeliness rules, 56 Fed. Reg. 3,759 supra (to be codified at 4 C.F.R. § 21.2(c)). We apply the significant issue exception to our timeliness rules sparingly. Institute for Combat Arms and Tactics, Inc., B-237404, Oct. 30, 1989, 89-2 CPD ¶ 397. The Dover protest, concerning whether a particular purchase should have been made by a competitive procurement rather than through a sole-source award, does not fall under this exception since the issue raised relates only to this specific procurement action and does not have widespread significance to the procurement community. Keco Indus., Inc., B-238301, May 21, 1990, 90-1 CPD ¶ 490.

The protest is dismissed.



John Brosnan
Assistant General Counsel